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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 8, 1999

By Hand

Magalie Roman Salas
Secretary
Federal Communications Commission
Room CY-A257
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation
In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Ms. Salas:

Transmitted herewith for inclusion in the public record of the above-referenced "permit but disclose" proceeding are two copies of a written *ex parte* letter that was delivered this day to Lawrence E. Strickling, Chief of the Common Carrier Bureau.

If you have any questions concerning this filing, please contact the undersigned.

Sincerely,

Charles W. Logan

cc: Carol Mattey
Staci Pies
Jane Jackson
Howard Shelanski
Vincent Paladini
Margaret Egler
Pat DeGraba
Don Stockdale
David Hunt

Enclosure

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October 8, 1999

By Hand

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Communication
In the Matter of Deployment of Wireline Services
Offering Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Mr. Strickling:

This written *ex parte* communication is submitted to you for consideration in connection with the above-referenced rulemaking proceeding. The submission is made on behalf of NorthPoint Communications, Inc., and HarvardNet, Inc., which are competitive local exchange carriers (LECs) that currently provide digital subscriber line (DSL) service in various markets in the United States (referred to hereafter collectively as "DSL competitive LECs").

Briefly stated, this submission summarizes the views of the DSL competitive LECs regarding both the importance of line sharing to the emergence of effective DSL competition, particularly for residential consumers, as well as the need for the prompt and effective availability of line sharing from incumbent LECs on reasonable terms, and conditions, including cost-based rates. In addition, in furtherance of the objective of making DSL services over shared lines available from competing providers expeditiously, the Commission should establish specific pricing principles to guide incumbent and competitive LECs as well as state commissions in implementing line sharing.

The Commission's establishment of a prompt deadline for the incumbent LECs to provide access to shared lines, of course, does not necessarily mean that they will comply with that requirement by offering access by that date on reasonable terms and conditions. As the Commission is aware, DSL competitive LECs have encountered substantial resistance and delays in attempting to implement the Commission's March 1999 order [1] that was intended to accelerate the deployment of co-located competitive LEC facilities

[1] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking (FCC 99-48), CC Dkt. No. 98-147 (Mar. 31, 1999) (*Advanced Wireline Services Order*).

in incumbent LEC offices.[2] Consequently, the DSL competitive LECs propose below interim arrangements for the provision of access to line sharing that incumbent LECs would be required to offer. One set of interim arrangements is intended to ensure that incumbent LECs that can offer line sharing to DSL competitive LECs as of the Commission-prescribed deadline make such access immediately available on reasonable terms. A second set of arrangements is designed to ensure that incumbent LECs that allege that they are unable to offer line sharing as of the deadline have an effective incentive to begin providing line sharing as promptly as possible and in the interim are not permitted to exploit their current anticompetitive advantage as the exclusive provider of DSL service over a shared line.

I. The FCC Should Require Incumbent LECs Promptly to Offer Line Sharing as an Unbundled Network Element

The comments filed in this proceeding by competitive providers of DSL services demonstrate that incumbent LECs should be required to offer line sharing as an unbundled network element,[3] pursuant to section 251(c)(3) of the Communications Act of 1934, as amended ("Act").[4] Indeed, the Commission's acknowledged in the Advanced Wireline Services Order that it had found "no evidence that line sharing was not technically feasible."[5] Moreover, although incumbent LECs previously raised various technical and operational objections to the provision of DSL services over a twisted copper pair that is simultaneously used for voice grade service,[6] those arguments largely appear to have been abandoned. The incumbent LECs themselves have refuted any such technical objections by offering DSL service over a line that also furnishes voice grade service to the same customer premises.[7]

More recent incumbent LEC assertions regarding operations support system (OSS) problems caused by the introduction of line sharing are similarly unfounded.[8] On

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[2] *See, e.g.*, Letter from Charles I. Hadden, Counsel for Covad Communications Co. to Dorothy T. Attwood, Chief, Enforcement Division, at 9-19 (Apr. 20, 1999).

[3] *See, e.g.*, Comments of NorthPoint Communications, Inc. at 25-28 (June 15, 1999).

[4] 47 U.S.C. § 251(c)(3).

[5] *See Advanced Wireline Services Order* at para. 97.

[6] *Id.*

[7] *See, e.g.*, Bell Atlantic Telephone Companies, Trans. No. 1076 (Sept. 1, 1998).

[8] *See* Letter from Lincoln E. Brown, SBC Telecommunications, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Dkt. No. 98-147 (Sept. 23, 1999).

September 30, 1999, several DSL competitive LECs filed a written *ex parte* submission consisting largely of a detailed analysis of OSS issues potentially raised by the incumbent LECs' provision of line sharing.[9] That analysis showed that for the most part, such problems could be addressed through modest enhancements to the incumbent LECs' systems and, in any event, interim procedures could be put in place almost immediately to permit the provision of line sharing while changes to the OSS were completed. In short, OSS issues related to the incumbent LECs' offering of line sharing are manageable and would not justify any delay in their compliance with an FCC order to offer access to line sharing as an unbundled network element.

Moreover, a delay in requiring the provision of access to shared lines clearly would have a significant adverse impact on competition in the DSL market. Because incumbent LECs today are the only carriers able to offer access to DSL service through a shared line, they enjoy anti-competitive pricing and provisioning advantages over DSL competitive LECs that are forced to obtain and pay the cost of a second, stand-alone loop to provide their DSL services. Those unfair advantages severely hamper the ability of new providers of DSL services to compete effectively with incumbent LECs to serve residential customers. Indeed, in some cases, residential customers may already be using their existing loops for voice and fax services. Obviously, the longer the delay in making access to shared lines available, the longer the delay in delivering the benefits of DSL competition to residential consumers (as well as the Internet service providers that purchase DSL service to deliver their retail service to end users). This consideration alone would justify the establishment of a prompt deadline for the provision of access to line sharing.

In addition to setting an expeditious deadline, the Commission also should provide specific guidance to incumbent LECs and state commissions concerning the terms, especially the prices, under which access to line sharing will be provided to competitive LECs. Such guidance is essential to avoid needless delays and uncertainty in implementing line sharing. Moreover, the two state commissions that commented on this issue in the rulemaking proceeding expressly supported the FCC's adoption of pricing rules for line sharing.[10]

The six types of costs that an incumbent LEC potentially could incur to provide access to line sharing are: 1) loops; 2) splitters; 3) cross connects; 4) OSS; 5) common costs (overhead costs); and 6) line conditioning and other non-recurring charges. We recommend below specific principles for setting prices for each of these costs that the Commission should require state commissions to follow in arbitrating line sharing agreements between incumbent LECs and competitive DSL LECs. Section 252(d)(1)(A)(i) of the Act requires that the rate for an unbundled network element be

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[9] *See* Letter from Ruth Milkman to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Dkt. No. 98-147 (Sept. 30, 1999).

[10] *See* Comments of the State of California and the Public Utilities Commission of California, CC Docket No. 98-147, at 8 (June 15, 1999); Comments of Oklahoma Corporation Commission, CC Docket No. 98-147, at 19 (June 15, 1999).

"based on the cost ... of providing the ... network element ...."[11] The proposed principles are designed to ensure that the prices assessed by incumbent LECs for line sharing satisfy this statutory requirement.

With respect to the loop costs that may be allocated to line sharing, the Commission has a reliable benchmark for ensuring cost-based loop rates for line sharing. Specifically, the Bell Operating Companies (BOCs) and other large, incumbent LECs offer DSL services over shared access lines as interstate special access services. Under the FCC's applicable price cap rules for new access services, the recurring charges for such a service may not be set below the "direct costs" of providing the service,[12] which are comparable to incremental costs. Further, in the case of DSL offerings, actual and potential competition from cable-based high speed Internet access services would tend to force incumbent LECs to price its offerings at levels that approach their long run incremental costs. Consequently, in these circumstances, the Commission should require that the price of the loop component of line sharing not exceed the loop cost that the incumbent LEC allocates to its own DSL service provided over a shared line. For the same reasons, the Commission should hold that an incumbent LEC may allocate to line sharing no more than the common costs that it allocates to its own DSL service provided over a shared line. These pricing principles do not bar an incumbent LEC from modifying the loop and overhead costs allocated to its DSL access service offering. Rather, they simply require that such costs allocated to an incumbent LEC's line sharing network element not exceed the amount of the same costs assigned to its DSL access service offering.

With respect to OSS costs, incumbent LECs should be permitted to recover from line sharing charges only OSS costs that are incurred incrementally as a result of their obligation to offer access to line sharing. They should not be allowed to recover OSS costs that were incurred to provide their own DSL services over shared lines. The record in this proceeding, as supplemented by the recent Statement of Dennis J. Austin, shows that OSS costs associated with the implementation of line sharing likely will be *de minimis*. Hence, the incumbent LECs will bear a heavy burden in negotiating amendments to their interconnection agreements with competitive LECs if they wish to show that OSS costs are, in fact, significant.

Prices for cross connects should not pose any significant issue, since incumbent LECs currently provide such facilities to interconnect their loops with the co-located facilities of competitive LECs installed in incumbent LEC offices. Incumbent LECs should be required to furnish cross connects between a splitter and a competitive LEC's co-located equipment at the same price.

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[11] 47 U.S.C. § 252(d)(1)(A)(i).

[12] *See Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking (FCC 99-206), CC Dkt. No. 96-262, at para. 35 (Aug. 27, 1999); *see also* 47 C.F.R. § 61.49(f)(2).

Although the incumbent LECs do not currently provide access to a splitter as part of an unbundled network element offering, the Commission has the ability to bring market forces to bear on their provision of this segment of line sharing. Specifically, the Commission could direct incumbent LECs to provide access to a splitter as part of their line sharing unbundled network element, but also permit a competitive LEC, at its option, to purchase a splitter that complies with industry standards, and transfer it to the incumbent LEC, in the event that the competitive LEC can do so more quickly or at a lower price than the incumbent LEC.

The non-recurring costs that an incumbent LEC incurs to provide access to line sharing should be *de minimis*. Since the loop involved already would be in service, no costs would be incurred to activate the line. Indeed, the only task necessary to offer access to the shared line is the installation of a cross connect at the incumbent LEC's central office, a task that requires, at most, a few minutes to complete.

To the extent that any conditioning is required to facilitate the delivery of shared-line DSL service, costs related to such conditioning should be *de minimis*. In any case, conditioning charges for shared lines could never exceed the charges that incumbent LECs are permitted to recover for similar conditioning on stand-alone loops for DSL services.

In the view of the DSL competitive LECs, the foregoing pricing principles are straight-forward and relatively simple for state commissions to administer in an arbitration, particularly since the incumbent LECs submitted cost information with the FCC in support for their own offering of DSL over a shared line. These principles, however, are absolutely essential to the speedy deployment of DSL over shared lines by competitive LECs on terms and conditions that make the service affordable for residential consumers.

II. Incumbent LECs Should Be Required To Offer Line Sharing Pursuant to Interim Agreements With DSL Competitive LECs, Pending Agreement on Amendments to Their Interconnection Agreements

As discussed previously in comments and written *ex parte* submissions filed by DSL competitive LECs in this proceeding, there are no significant technical or OSS impediments to the incumbent LECs' prompt provision of access to line sharing as unbundled network element. Implementation of that requirement, however, will require amendments to the existing interconnection agreements between incumbent LECs and DSL competitive LECs. Under the procedures set forth in section 252 of the Act, that process could take up to nine months from the date the request for negotiation is received by an incumbent LEC.[13] Such a delay would further exacerbate the incumbent LECs' existing anticompetitive advantage and postpone the benefits of DSL competition for residential consumers.

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[13] *See* 47 U.S.C. § 252(b)(4)(C).

The Commission, however, need not and should not tolerate any such delay. Rather, the Commission should use its discretionary authority under the Act (discussed below) to require incumbent LECs to offer access to line sharing under interim arrangements that would eventually be superseded by amended interconnection agreements between the parties. The Commission further should require the incumbent LECs to propose interim agreements that comply with the pricing principles outlined above, with one exception. Since the current record in this proceeding does not support a finding that the incumbent LECs' incremental OSS costs attributable are more than *de minimis*, the incumbent LECs should not be permitted to allocate any such costs to the charges for line sharing set forth in the interim agreements. As noted above, incumbent LECs would have the opportunity in the section 252 process to demonstrate that they in fact incurred incremental OSS costs in connection with the provision of line sharing and are entitled to recover those costs through their charges for access to this unbundled network element.

To implement this approach, we recommend that the Commission require incumbent LECs to offer such interim line sharing agreements to competitive LECs within 60 days after the Commission's order requiring the provision of line sharing became effective and that the interim agreements take effect within 30 days thereafter. An interim agreement would remain in effect until the incumbent and competitive LECs had agreed on an amendment to their interconnection agreement to govern the provision of line sharing on a longer term basis. At that point, the interim agreement would expire and be superseded by the amended interconnection agreement. Moreover, to foreclose potential claims of harm by incumbent LECs, the Commission could require that the pricing terms of such arrangements be subject to a "true up" after longer term line sharing agreements take effect. That is, to the extent that the prices for line sharing in the longer term agreements varied from the interim prices, incumbent LECs would be entitled to recoupment and competitive LECs would be entitled to refunds, as the case may be, for the period that the interim arrangements were in effect.

III. Incumbent LECs That Allege That They Are Unable to Provide Line Sharing On a Timely Basis Should Be Required to Offer "Surrogate Line Sharing" Until They Can Satisfy the Commission's Order

Despite the record evidence showing that incumbent LECs should be able to offer line sharing to competitive LECs promptly, it is conceivable that some incumbents may claim that they are unable to meet whatever deadline the Commission may establish for providing access to this unbundled network element. Rather than engaging in a protracted administrative proceeding about the validity of such a claim, the DSL competitive LECs suggest that the Commission require such incumbent LECs to offer "surrogate line sharing" on an interim basis until such time as they are able to comply with the Commission's order. This approach would both create a strong incentive for incumbent LECs to provide line sharing as quickly as possible as well as limit significantly their ability to exploit their current advantage as the sole provider of DSL over shared lines.

Specifically, incumbent LECs that are unable to provide non-discriminatory access to shared lines on a timely basis would be required to offer access to separate, unbundled loops at a very steep discount. We would suggest that the surrogate price be set at 10 percent of the applicable unbundled loop rate, because we believe that roughly would approximate the rate that we expect the negotiation/arbitration process will produce. In addition, to ensure that an incumbent LEC is not able to continue to exploit its current anticompetitive advantage over competitors by failing to provide line sharing, the Commission should bar incumbent LECs from serving new DSL customers over shared lines. Instead, incumbents would be required to offer service to new customers exclusively through the same facilities available to competitive LECs – separate loops. Under this approach, incumbent and competitive LECs would be placed on a substantially more level playing field in the DSL market than exists today.

We emphasize that this "surrogate" approach is not in any way an alternative method for an incumbent LEC to comply with its obligation to offer line sharing as an unbundled network element. Rather, it is an expedient means of mitigating the competitive harm of an incumbent LEC's inability to comply with that obligation. Indeed, BOCs that were unable to comply with the deadline to provide line sharing as an unbundled network element would be barred from obtaining authority to provide in-region interLATA services under section 271 of the Act until they were able to offer "[n]ondiscriminatory access to network elements."[14]

IV. The Commission Clearly Has Authority Under The Act To Adopt The Proposed Line Sharing Policy

The Act grants the Commission broad authority to adopt rules to implement the 1996 Act. The Supreme Court confirmed this in *AT&T Corp. v. Iowa Utilities Board*,[15] when it held that section 201(b) of the Act "means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which includes §§ 251 and 252, added by the Telecommunications Act of 1996."[16] Section 4(i) further provides that the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[17] Collectively, these provisions furnish the Commission with the authority to implement such measures as it may find, in the exercise of its expert judgment, necessary to accomplish the objectives of the Act.

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[14] 47 U.S.C. § 271(c)(2)(B)(ii).

[15] 119 S.Ct. 721 (1999).

[16] *Id.* at 730 (footnote omitted).

[17] 47 U.S.C. § 154(i).

In this case, the Commission's statutory authority empowers the agency to adopt initiatives that are designed to facilitate competition in the provision of advanced services to residential consumers and to address the current competitive disadvantages facing competitive LECs in offering these services. Such measures promote the explicit policy set forth in section 7 of the Act "to encourage the provision of new technologies and services to the public,"[18] as well the Commission's mandate in section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...."[19]

Moreover, the Act does not require that the Commission accept potentially months of delay in the delivery of the benefits of advanced services competition to residential consumers. As noted above, because incumbent LECs today are the only carriers able to furnish advanced services over a shared line, depriving competitive LECs of any relief until the section 252 negotiation/arbitration process is completed would not only affect adversely the interests of consumers, but would further exacerbate the anticompetitive advantages that incumbent LECs currently enjoy. Consequently, there is a sound basis in the record of this proceeding for the Commission to order interim relief for competitive LECs, pending the completion of the section 252 process.

The Commission previously has used its authority under the Act to craft interim remedies that were designed to promote a smooth transition from the monopoly *status quo* to a different, pro-competitive regime. In the *Local Competition First Report and Order,* for example, the Commission recognized that availability of unbundled network elements at cost-based prices would enable long distance companies "to avoid totally the [carrier common line charges] and [transport interconnection charges], which in part represent contributions toward universal service, by serving their local customers solely through the use of unbundled network elements...." [20] The Commission, therefore, concluded that it should establish "a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goal of the 1996 Act...."[21] Specifically, the FCC permitted incumbent LECs to continue to apply applicable interstate and intrastate switched access charges to toll traffic carried over unbundled loops and other network elements for an interim period until a new universal service plan was adopted. Subsequently, the Eighth Circuit sustained the Commission's establishment of that transitional scheme. [22] Noting that "substantial deference by courts is accorded to an

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[18] 47 U.S.C. § 157(a).

[19] Pub. L. No. 104-104, 110 Stat. 56, § 706(a) (1996).

[20] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, at para.720 (1996).

[21] *Id.*

[22] *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997), *affirming in part Local Competition First Report and Order*, 11 FCC Rcd 15499, at ¶ 720 (1996). *See also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135 (D.C.

agency when the issue concerns interim relief," the Eighth Circuit concluded that "[w]e do not think it contrary to the Act to institute access charges with a fixed expiration date, even though such charges appear on their face to violate the statute, in order to effectuate another part of the Act."[23]

The Commission's objective of promoting competition among providers of DSL services, particularly for residential consumers, in this proceeding similarly supports the implementation of a transitional scheme that will foster the emergence of that competition in the short run. The alternative, as noted above, is to allow incumbent LECs to continue to exploit their anticompetitive advantage until they enter into amended interconnection agreements with their competitors. Indeed, requiring incumbent LECs to offer interim arrangements is a reasonable way of creating an incentive to complete those negotiations as promptly as possible. Absent such arrangements, the incumbent LECs' incentives are to delay in order to maintain their market advantage. It bears emphasis that the adoption of this temporary relief would not interfere in any way with the procedures established by section 252 for negotiation and arbitration. Rather, the temporary arrangement would be superseded as soon as the section 252 process is completed. Moreover, the "true-up" process would ensure that the prices established for line sharing were determined by negotiation or arbitration, consistent with the statute.

Cir. 1984) (upholding FCC's adoption of interim freeze of separations formula allocating costs of nontraffic sensitive plant between intrastate and interstate jurisdictions).

[23] *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d at 1073-74.

In sum, we urge the Commission to move expeditiously to require incumbent LECs to offer access to line sharing as an unbundled network element at cost-based prices. Further, the Commission should mandate that incumbent LECs offer interim arrangements, either line sharing or "surrogate line sharing," until they complete the process of amending their interconnection agreements with competitive DSL providers to include access to line sharing.

Respectfully submitted,

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